

HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Chapter VIII Rule 32 (2) (b)
Description of the Case.

Writ Petition No. 3223 (S/S) of 2001

Date of Decision : 6th November, 2006

A.F.R (Approved for reporting)

~~Not approved for reporting.~~

Date : 06.11.2006

Initial of Judge.

Note : Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARANCHAL, AT NAINITAL

Writ Petition No. 3223 (S/S) of 2001

1. Sri Badri Datt Bhatt,
S/o Sri Narayan Datt Bhatt
R/o Baluwakote, Tehsil Dharchula
District Pithoragarh
 2. Sri Bhawani Datt Bhatt
S/o Sri Keshav Datt Bhatt
R/o Baluwakote, Tehsil Dharchula
District Pithoragarh
- Petitioners

Versus

1. Secretary Education Dept.
Uttaranchal Shasan Dehradun
 2. Director of Education (Madhyamik)
Uttaranchal Dehradun
 3. Joint Director of Education, Kumaun Region,
Nainital
 4. District Inspector of Schools Pithoragarh
 5. Principle, Govt. Inter college
Baluwakote, Tehsil Dharchula
District Pithoragarh.
- Respondents

Dated:- 06th November, 2006

Mr. Manoj Tiwari learned counsel for the petitioners.
Mr. N.P. Sah learned Standing Counsel for the State.

Hon'ble J. C. S. Rawat, J.

1. By means of this writ petition under section 226 of the Constitution of India, the petitioners have sought the following prayers:-

- (i) issue a writ, order or direction in the nature of certiorari calling for the record and to quash the order dated 14.03.2001 passed by the respondent no.3.
- (ii) issue a writ order or direction in the nature of certiorari for quashing the order dated 10.04.2001 passed by the respondent no.5.

- (iii) issue a writ order or direction in the nature of mandamus commanding the respondents to grant the benefit of Fundamental Rule 22-B of the Financial Hand Book Volume II to the petitioners by fixing their pay at the stage next above the pay arrived at by notionally increasing their pay in the lower post by one increment.
- (iv) Issue a writ order or direction in the nature of mandamus commanding the respondents to forthwith pay the entire arrears of salary consequent to pay fixation in accordance with Fundamental Rule 22-B of the Financial Handbook Volume II to the petitioners.
- (v) Issue any other suitable writ order or direction as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.
- (vi) Award the costs of the writ petition in favour of the petitioners.

2. The petitioners' case is that the petitioner no.1 & 2 were promoted as Asst. Teacher C.T. Grade on 21.01.1982 and 19.02.1982 respectively. In the month of January 1992, a policy decision was taken by the State Government to declare the cadre of C.T. Grade Teachers as "Dying Cadre". A Government Order dated 09.01.1992 was issued providing all such C.T. Grade Teachers who possessed the requisite qualifications and have completed 10 years of satisfactory service shall be absorbed in L.T. Grade Teacher w.e.f. 01.01.1986 or any

subsequent date thereafter when such Teacher completes 10 years of service on the post of C.T. Grade Teacher. Pursuant to the said policy decision, the petitioner no.1 and 2 were absorbed on the post of L.T. Grade Teacher w.e.f. 21.01.1992 and 19.02.1992 respectively i.e. the date on which they completed 10 years of service on the post of C.T. Grade Teacher. The pay of the petitioners was fixed at Rs.1540/- in the cadre of C.T. Grade Teacher. It has been alleged in the petition that according to the provision contained in Fundamental Rule 22-B of the Financial Hand Book Volume II, the petitioners were also entitled for fixation of their pay in the higher post at the next stage after giving a notional increment of Rs. 40/- and thus their pay was liable to be fixed at Rs. 1600/- after absorption. It was further pleaded that one-Kasim Hussain who was initially appointed as Assistant Teacher C.T. Grade w.e.f. 20.10.1986 was not entitled to be absorbed in the cadre of L.T. Grade. The benefit of Rule 22-B was given to him by fixing his pay after giving one notional increment on his pay scale. The Joint Director of Education, Kumaon Region vide his letter dated 14.03.2001 stated that the pay of the petitioners were wrongly fixed at Rs.1560/-. On the basis of this, the Principal, Government Inter College passed the impugned order dated 10.04.2001 by which the basic pay of the petitioners were fixed at Rs.1520/- and a sum of Rs.20 was given as personal pay. The Principal, Government Inter College also directed to recover excess amount paid to the petitioners. It was further pleaded that the petitioners were drawing a sum of Rs.1540/- in the C.T. Grade Feeling aggrieved, the petitioners have filed the present petition.

3. In pursuance of the writ petition, the respondents have filed the counter affidavit in which it has been alleged that the petitioners were getting a pay scale of Rs.1540/- in the C.T. Grade before their merger. It has been alleged that they are paying Rs.20 as personal pay to the petitioners in accordance with the directions contained in the Financial Handbook. The respondents had further pleaded that the petitioners are not entitled to get the benefit of Rule 22-B of the U.P. Financial Hand Book, Volume II because neither they were promoted nor they were appointed on the cadre of L.T. Grade. The State Government had declared the cadre of C.T. Grade Teacher as "Dying Cadre" vide G.O. dated 09.01.1992 and as such they were provided the cadre of L.T. Grade in lieu thereof. It was further alleged in para 4 of the counter affidavit that the pay of the petitioners have been fixed by the G.O. dated 9.1.1992. It was further alleged in the counter affidavit that the respondents wrongly fixed the pay scale and as such petitioners are entitled to recover excess amount already paid to them.

4. I have heard learned counsel for the parties and perused the record.

5. Audit Instruction No.4 regarding Rule 22 of the U.P. Fundamental Rules is quoted below:-

"4. A time-scale may be of recent introduction whereas the cadre or class to which it is attached may have been in existence on a graded scale before the time-scale came into force or it may be that one time-scale has taken the place of another. If a government servant has held substantively or officiated in a post in the cadre or class prior to the introduction of a new scale, and has drawn

during the period salary or pay equal to a stage, or intermediate between two stages, in the new time-scale, then the initial pay in the new time-scale may be fixed at the salary or pay last drawn and the period during which it was drawn may be counted for increment in the same stage, or the salary or pay was intermediate between two stages, in the lower stage of that time-scale.”

6. Learned counsel for the petitioners contended that the salary of the petitioners was fixed by the respondents and it was not on account of any misrepresentation made by the petitioners to get the higher pay scale. It was further contended that it was the fault of the department to fix the salary on the wrong construction of the Rules. It was further contended that the petitioners cannot be held to be at fault. As such, the recovery of excess amount cannot be made from petitioners. Learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court in **Shyam Babu Verma & others Vs. Union of India 1994(2) SCC 521** in which the petitioners (Shyam Babu & others) were appointed as Pharmacists in the scale of Rs.130-240. Since 1973 petitioners started getting the revised scale of Rs.330-560. A seniority list of Pharmacists in the pay scale of Rs.330-560 was prepared in which the name of the petitioners were also included. The respondents had issued the order to the petitioners that their salary was being fixed in the scale of Rs.330-480 instead of Rs.330-560 w.e.f. 1973. It was further said that after completion of 10 years of service, they would be getting the scale of Rs.330-560. There was no dispute that

after completion of 10 years of service, petitioners had been getting the scale of Rs.330-560. As the petitioners were not qualified pharmacists possessing requisite qualifications, they were not entitled to the pay scale of Rs.330-560 as per recommendation of the IIIrd Pay Commission. The Hon'ble Supreme Court has held as follows:-

“11. Although we have held that the petitioners were entitled only to the pay scale of Rs.330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs.330-560 but as they have received the scale of Rs.330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 w.e.f. January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.”

7. Learned counsel for the petitioners has also relied upon the decision of the Hon'ble Supreme Court in **Sahib Ram Vs. State of Haryana 1995 Suppl(1) SCC 18**, in which the petitioner (Sahib Ram) was appointed in the year 1972 as a Librarian in the Government College in the pay scale of Rs. 220-550. The Government upgraded the pay scales of librarians w.e.f. 1.1.1973 to Rs.700-1600, if they possessed a

minimum qualifications of first or second class M.A., M.Sc., M.Com. plus a first or second class B.Lib. Science or a Diploma in Library Science, the degree of M.Lib Science being a preferential qualification. In pursuance of this the Principal of the College, where the petitioner was working as a Librarian allowed him the revised pay scale of Rs.700-1600. However, the Government of Haryana directed the Principal to withdraw the pay scale of Rs.700-1600. The Hon'ble Supreme Court has held as follows:-

“5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances, the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs.”

8. In view of the above observations made by the Hon'ble Supreme Court, in the instant case the respondents are not entitled to recover excess amount which has already been paid to the petitioners. As such, the orders dated 14.03.2001 and 10.04.2001 passed by the respondent No.3 & 5 respectively are liable to be quashed only to the extent that no steps shall be taken to recover or to adjust any excess amount paid to the

petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.

9. Learned counsel for the petitioners further contended that the Rule 22-B of the U.P. Financial Hand Book Volume-II, which is applicable to Uttaranchal is provided that where a Government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed either in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attached to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay arrived at by notionally increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued. Learned counsel for the petitioners further contended that the petitioners' pay scale was fixed at Rs.1540 and they were entitled for a notional increment of Rs.40 and thus their pay scale should have been fixed at the next stage according to the aforesaid Rule. Standing Counsel refuted the contention and contended that the petitioners are not entitled to get the benefit of Rule 22-B because the petitioners had not been promoted or appointed to the new post and the cadre of C.T. Grade was declared as "Dying Cadre" by the State Government and the petitioners were merged into L.T. Grade. To decide the controversy, it would be necessary to go through the Rule 22-B of the U.P. Financial Hand Book Vol.II (Part II to IV) which is quoted below:-

"22-B (1) Notwithstanding anything contained in these rules, where a Government servant holding a post in substantive, temporary or officiating capacity is promoted or appointed either in a substantive, temporary or officiating capacity

to another post carrying duties and responsibilities of greater importance than those attached to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay arrived at by notionally increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued:

Provided that:-

- (i) the provisions of this rule shall not apply where a Government servant holding a post in a substantive, temporary or officiating capacity and drawing pay in a pay scale the maximum of which exceed Rs.900 p.m., Rs.1200 p.m. Rs.1720 p.m. (Rs.2050 p.m. with effect from January 1, 1984) or Rs.4500 p.m. respectively in the scales introduced with effect from April 1, 1965, August 1, 1972, July 1, 1979 or January 1, 1986, is appointed in a substantive, temporary or officiating capacity to a post carrying higher duties or responsibilities; and*
- (ii) the provisions of Fundamental Rule 22-B (1) shall be deemed to have been made applicable without any pay limit w.e.f. January 1, 1988.*

Provided further that the provisions of sub-rule (2) of Fundamental Rule 31 shall not be applicable in any case where the initial pay is fixed under this rule:

Provided also that a where Government servant is immediately before his promotion or appointed to higher post, drawing pay, at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by an amount equal to the last increment in the time-scale of the lower post:

Provided that if a Government servant either

(1) has previously held substantively or officiated in-

- (i) the same post, or*
- (ii) a permanent or temporary post on the same time-scale, or*
- (iii) a permanent post other than a tenure post or a temporary post on an identical time-scale, or*

(2) is appointed substantively to a tenure post on a time-scale identical with that of another tenure post which he has previously held substantively, or in which has previously officiated;

The proviso to Fundamental rule 22 shall apply in the matter of the initial fixation of pay and counting of previous service for increment.

10. The aforesaid Rule clearly shows that it will apply where the Government servant is *promoted or appointed* to another post carrying duties and responsibilities of greater importance than those attached to the post held by him. Learned counsel for the petitioners contended that the merger/absorption is also a mode of appointment to the higher post. I do not find any substance in the contention because the G.O. dated 09.01.1992 (Annexure C.A.-I) clearly reveals that the cadre of C.T. Grade Teacher had been declared as “Dying Cadre” and C.T. Grade Teachers who were having the requisite qualification had been merged/absorbed in the L.T. Grade. It is also pertinent to mention here that there was not need to create the higher post for the same and ***Asstt. Teacher C.T. Grade who were having requisite qualification had carried their own post with them.*** Thus, said appointments cannot come under the purview of ‘promotion’ or ‘appointment’. It is clear from the Rule itself that the said Rule is not applicable in case of the merger/absorption. The rule quoted in preceding para 5 would be applicable in this case.

11. It was further contended on behalf of the petitioners that in the month of January 1992 a policy decision was taken by the State Government to declare the cadre of C.T. Grade Teachers as “Dying Cadre”. The G.O. dated 09.01.1992 provides that all such C.T. Grade

Teachers who possessed the requisite qualifications and have completed 10 years of satisfactory service shall be absorbed in L.T. Grade Teacher w.e.f. 01.01.1986 or any subsequent date thereafter when such teacher completes 10 years of satisfactory service on the post of C.T. Grade Teacher. Pursuant to the said policy decision, the petitioner no.1 was absorbed on the post of L.T. Grade Teacher on 21.01.1992 and the petitioner no.2 was absorbed on 19.02.1992. It was further contended that the C.T. Grade Teacher who have completed 10 years of satisfactory service were absorbed on the post of L.T. Grade Teacher and they were given the benefit of time scale. Their pay was again fixed at a higher level than their pay in the original cadre. Thus the juniors to the petitioners are getting higher pay than the petitioners. Learned counsel for the respondents refuted the contention. It is pertinent to mention here that the petitioners were qualified at the time when they were absorbed in the L.T. Grade. If a class of teachers who were not qualified at that time and later on they were absorbed and if they got any benefit by virtue of the subsequent developments, the petitioners cannot claim the equality with them. In case, they are junior to the petitioners they had a remedy to seek redressal by the government under the relevant rules of the Financial Handbook. It is provided under the rules that if a junior is getting more pay scale than the senior, the State Government may on an appropriate representation reimburse the excess amount which the junior is getting. Thus I do not find any merits in the contentions raised on behalf of the petitioners.

12. In view of the foregoing discussion, I am of view that it is not open to the employer to recover any

amount of the salary already paid to the employee, even if, later on, it is found that the employee was not entitled to the salary at that rate/scale of pay unless the order fixing the salary/pay-scale is corrected by the employer shortly after it was passed. Therefore, the orders dated 14.03.2001 and 10.04.2001 passed by the respondent No.3 & 5 respectively are quashed only to the extent that no steps shall be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.

13. The petition is disposed of accordingly. No order as to costs.

(J.C.S. Rawat, J.)

Dated 06.11.2006

LSR